belongs to B, who has no remedy against the innocent executor,[2] the situation is analogous to that where one of two legatees has been fully paid out of assets insufficient to satisfy both,[3] and the executor is insolvent;[4] accordingly, if the shares are still in A's possession, B should be allowed in equity to compel A to give them up.[5]

A recent case goes still farther, allowing B to recover from A all dividends received by the latter on the stock. *West* v. *Roberts*, [1909] 2 Ch. 180. The law in England is that a residuary or general legatee who is obliged to refund is generally not chargeable with interest;[6] but in this country at least one court has said that interest as well as principal must be refunded.[7] The case of a specific legacy is a stronger one: unlike that of a general or residuary legatee,[8] the specific legatee's right is clear-cut and defined, so that it will support an action at law immediately upon the assent of the executor.[9] And title to the shares must carry with it title to the dividends. It does not follow, however, that under all circumstances A should be made to account for these dividends. If he has spent the income and has no tangible property to show for it, the court in forcing him to account would be invoking the fiction of relation back to the impoverishment of one who acted innocently in pursuance of judicial authority.[10] Prior to the revocation of the original probate, legal title is indisputably in A,[11] so that if he has sold to a *bonâ fide* purchaser the title of the latter could not be impeached.[12] A, therefore, has innocently but gratuitously acquired legal title to property which of right belongs to B. The resemblance of his position to that of an innocent donee of trust property suggests the propriety of treating A as an innocent constructive trustee.[13]

A strict adherence to the doctrine of relation back would involve the court in the absurdity of holding that legal ownership in severalty is vested in two persons at the same time. But if B's interest, prior to the revocation of the first probate, be called an equitable one, and if A be treated as an innocent donee of trust property, his liability to account for the dividends will depend upon whether or not that income is still in his possession, either in its original form or in the shape of a traceable product.[14] If it is in his possession, there is no injustice in taking from him something which he has received as a mere windfall; but if the money has been spent, and he has nothing to show for it, he should not be held to account.

DISREGARDING THE SEPARATE PERSONALITY OF A CORPORATION. — The conception of a corporation as a personality wholly separate and dis-

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[2] Poag *v.* Carroll, Dud. Law (S. C.) 1.
[3] Anon., 1 P. Wms. 495.
[4] Orr *v.* Kaines, 2 Ves. 194; Wallace *v.* Latham, 52 Miss. 291.
[5] *Cf.* Le Baron *v.* Fauntleroy, 2 Fla. 276, 301.
[6] Gittins *v.* Steele, 1 Swanst. 199; Jervis *v.* Wolferstan, L. R. 18 Eq. 18, 27.
[7] See Buerhaus *v.* De Saussure, 41 S. C. 457.
[8] Deeks *v.* Strutt, 5 T. R. 690.
[9] Doe d. Saye *v.* Guy, 3 East 120; Williams *v.* Lee, 3 Atk. 223.
[10] *Cf.* Allen *v.* Dundas, 3 T. R. 125.
[11] Thompson *v.* Samson, 64 Cal. 330. *Cf.* Fisher *v.* Bassett, 9 Leigh (Va.) 119.
[12] Steele *v.* Renn, 50 Tex. 467. *Cf.* Packman's Case, 6 Coke 18 b.
[13] Otis *v.* Otis, 167 Mass. 245.
[14] See 19 HARV. L. REV. 515 *et seq.*

tinct from the individuals who compose it, whether it be considered a legal fiction or a reality,[1] has, nevertheless, been a ruling principle in the development of the common law of corporations, and is the characteristic which most distinguishes a corporation from unincorporated associations.[2] It is this personality which is liable on contracts made in the corporate name,[3] which must be the grantor of corporate property even though the shares of stock are owned entirely by one man,[4] and against which, as party to a suit, there cannot be introduced in evidence the admission of a shareholder.[5] In the recent case of *In re Watertown Paper Co.*, 22 Am. B. R. 190, it was held that the claim of one corporation against another is provable in bankruptcy even though the shares in both corporations are owned entirely by the same individuals.

It is the opinion of some writers that, with the development of modern business corporations and the many statutory limitations on the corporate device, the conception of a separate personality has outlived its usefulness and a clear view may be had only by dismissing it.[6] Certainly the conception is not applicable where the powers granted to the individuals do not in reality constitute them a corporation. But if it is meant that the separate corporate personality should be disregarded in every case, it is no more than saying that the corporation itself should be eliminated. However, the formation of corporations has become such a simple matter under the general incorporation laws of modern times, that there are many possibilities for working fraud and injustice in the use of the corporate device where, if the conception of a separate corporate personality be retained throughout, it will be impossible to grant relief.[7] For example, certain individuals, having sold their business and good will to another and having contracted not to engage further therein, might form a corporation to enter into the same business. If the separate personality of a corporation could never be disregarded, the court would see only that separate personality, the corporation. As this has no connection with the contract of the individuals who compose it, relief, under the circumstances supposed, would be impossible.[8]

Certainly such a result would be undesirable. And it is believed that, while leaving the conception of the separate corporate personality entirely unaltered at law,[9] justice can be obtained by the interposition of equity on settled principles of equity jurisdiction. Equity has long had jurisdiction in many instances to restrain the unconscionable exercise of a legal right, when the plaintiff would have no standing in a court of law. So a tenant without impeachment of waste may be restrained from equitable waste;[10]

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[1] Carr, Corporations, 150–185.

[2] Warner *v.* Beers, 23 Wend. (N. Y.) 103, 155; 1 Clark & Marshall, Private Corporations, § 17.

[3] See People *v.* American Bell Telephone Co., 117 N. Y. 241, 255.

[4] Parker *v.* Bethel Hotel Co., 96 Tenn. 252.

[5] Fairfield County Turnpike Co. *v.* Thorp, 13 Conn. 173.

[6] Taylor, Corporations, 5 ed., Preface, ix; 19 Am. L. Rev. 114, where a like view is attributed to Pomeroy.

[7] 2 Cook, Corporations, 6 ed., § 663.

[8] Under similar circumstances relief was given in Beal *v.* Chase, 31 Mich. 490, and Booth *v.* Seibold, 37 N. Y. Misc. 101.

[9] Morawetz, Corporations, § 227.

[10] Duncombe *v.* Felt, 81 Mich. 332; Kane *v.* Vanderburgh, 1 Johns. Ch. (N. Y.) 11.

and, on a stipulation for a forfeiture, the defaulting party is frequently relieved in any manner made necessary by the circumstances of the case.[11] The right of using the corporate device when exercised to defeat justice may well be controlled by equity in the same way. And although at present the actual decisions do not seem to be governed by any settled theory of granting relief, as yet, except in a very few cases, the corporate personality has been disregarded only when there have been present the elements necessary to the equitable relief suggested.

LIBEL WITHOUT INTENT. — By affirming malice to be the gist of an action for defamation the books have given the impression that this action differs from other tort actions.[1] In fact, however, proof of malice has never been necessary, because, as is said, the law will conclusively presume malice from a publication without excuse or justification.[2] But it has always been clear that, given a libelous publication, the publisher cannot escape liability on the ground that the publication was inadvertent or accidental,[3] or that he did not believe the matter to be libelous;[4] so that a discrepancy exists between the actual requirements of the old courts and what they professed to require. On the other hand, it has been laid down that malice is not necessary; that it is not a question of the defendant's wickedness, but of the injury done to the reputation of the plaintiff in the opinion of other men;[5] and that to determine such injury the courts will regard the tendency of the publication rather than the intention of the publisher.[6] Thus if the plaintiff's friends and neighbors believe that he was referred to,[7] or if that is the reasonable impression conveyed by the publication,[8] the defendant is liable.

The tendency of modern courts in this country is to make no distinction, as regards malice or intention, between tort actions in general and actions for defamation.[9] High authority in England has expressed the view that there is civil responsibility for the consequences of a libelous publication where the defendant should have known that what he published was likely to injure the plaintiff.[10] Further it is said that neither the intention with which a tortfeasor acted, nor the state of his feelings toward the person injured or the public, can make him less responsible for the injury actually caused by his wrongful act.[11] Carelessly to utter defamatory statements entails the same responsibility for the injurious conse-

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[11] Tibbetts *v.* Cate, 66 N. H. 550; 1 Pomeroy, Equity, 3 ed., § 450.

[1] Odgers, Libel and Slander, * 5 and note.
[2] Bromage *v.* Prosser, 4 B. & C. 247.
[3] Odgers, Libel and Slander, * 264; Shepheard *v.* Whitaker, L. R. 10 C. P. 502.
[4] Curtis *v.* Mussey, 72 Mass. 261.
[5] Sheffill *v.* Van Deusen, 13 Gray 304.
[6] Odgers, Libel and Slander, * 264.
[7] Bourke *v.* Warren, 2 C. & P. 307.
[8] The King *v.* Clerk, 1 Barnardiston 304.
[9] Hanson *v.* Globe Newspaper Co., 159 Mass. 293, 302 and 304, *per* Holmes, J.; Farley *v.* Evening Chronicle Pub. Co., 113 Mo. App. 216, 227, and cases cited.
[10] Capital and Counties Bank *v.* Henty, 7 App. Cases 741, 742, *per* Blackburn, J.; Bower, Defamation, p. 55, note; Clerk and Lindsell, Torts, 2 ed., 474.
[11] Farley *v.* Evening Chronicle Pub. Co., *supra.*